

No. 82-915

Supreme Court, U.S.
FILED

JAN 14 1983

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE R. DONNELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

<i>American Construction Co. v. Jacksonville Ry.</i> , 148 U.S. 372	4
<i>Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.</i> , 389 U.S. 327	4
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.</i> , 240 U.S. 251	4
<i>United States v. Board of Supervisors</i> , 429 U.S. 642	2

Statute:

Voting Rights Act of 1965, 42 U.S.C. 1971 <i>et seq.</i> :	
Section 5, 42 U.S.C. 1973c	1, 3
Section 14, 42 U.S.C. 1973k(e)	2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-915

CLYDE R. DONNELL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, members of the Board of Supervisors of Warren County, Mississippi, seek review of a decision in which the United States Court of Appeals for the District of Columbia Circuit remanded for reconsideration by the district court a claim for attorney's fees. The claim was asserted against petitioners by nongovernment respondents in petitioners' unsuccessful suit for declaratory relief under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Because the district court's decision on remand may render moot the claims raised in the petition, review by this Court is not warranted.

1. Petitioners brought suit in 1978 under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, seeking a declaratory judgment that their proposed redistricting plan for election of supervisors for Warren County, Mississippi,

had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color (Pet. App. 2a).¹ The nongovernment respondents, who are minority voters from Warren County, moved to intervene as defendants, and a three-judge district court granted the motion (*ibid.*). In July 1979, the three-judge district court entered judgment against petitioners on the ground that they had failed to show a legitimate nonracial justification for a redistricting plan that diminished black voting strength (*ibid.*). This Court summarily affirmed. *Donnell v. United States*, 444 U.S. 1059 (1980).

2. In May 1980, the nongovernment respondents moved for an award of attorney's fees, on the ground that they were "prevailing part[ies]" within the meaning of the Voting Rights Act of 1965, 42 U.S.C. 1973f(e) (Pet. App. 3a).² In early 1981, the district court awarded attorney's fees in the amount of \$73,699.88 for work performed by counsel for nongovernment respondents (*id.* at 4a).³ Petitioners appealed, challenging both the nongovernment respondents' entitlement to any award at all and the reasonableness

¹Litigation over an earlier redistricting plan for Warren County led to this Court's decision in *United States v. Board of Supervisors*, 429 U.S. 642 (1977).

²42 U.S.C. 1973f(e) provides:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The United States did not participate in this aspect of the case in either the district court or the court of appeals.

³The original order granting attorney's fees was issued on February 19, 1981, and was amended on March 20, 1981. See Pet. App. 28a-33a.

of the amount awarded (*ibid.*). The nongovernment respondents cross-appealed, contesting the district court's approach to determination of hourly rates (*ibid.*).⁴

3. In June 1982, the court of appeals reversed and remanded the case (Pet. App. 1a-27a). The court of appeals concluded that the district court must resolve the basic question whether the contribution of the nongovernment respondents to the successful outcome of the lawsuit was sufficient to justify any fee award at all (*id.* at 12a-13a). The court of appeals ruled (*id.* at 12a):

Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation.

Because the district court had failed to determine the significance, if any, of the efforts of the nongovernment respondents, the court of appeals remanded for further proceedings (*id.* at 13a). The court of appeals also addressed various arguments by the parties concerning how the amount of the fees should be calculated (*id.* at 13a-17a), but noted that "if the district court on remand finds that intervenors are not entitled to any fees, the discussion [of the manner of computing the fee] will become moot" (*id.* at 13a).

⁴The claim of nongovernment respondents for attorney's fees was decided by a single district judge (see Pet. App. 32a, 33a), and petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit, notwithstanding the provision of 42 U.S.C. 1973c that actions for declaratory judgments under Section 5 of the Voting Rights Act of 1965 shall be heard by a three-judge court and any appeal therefrom shall lie to this Court. Neither the parties nor the courts below discussed the propriety of the disposition of the claim for attorney's fees by a single judge and appeal to the court of appeals. That issue is not raised in any of the questions presented in the petition.

4. In this Court petitioners raise a variety of issues, including the proper standard for determining when intervenors may be prevailing parties (Pet. 7-12), the proper method for determining the prevailing hourly rate (*id.* at 12-16), and the scope of the district court's responsibility in resolving contested fee requests (*id.* at 17-20). In view of the interlocutory nature of the court of appeals' decision, none of the issues raised by petitioners is ripe for review. There has been no opportunity for the district court to apply the standards set out by the court of appeals, and the factual record is inadequate. Thus, petitioners present only a series of abstract questions at this stage.

Moreover, if petitioners prevail on remand, there will be no need for them to seek review of the questions they raise in their petition. On the other hand, if they are unsuccessful on remand, they may raise whatever challenges are appropriate, including some or all of those raised in this petition, on a more developed factual record. Petitioners have suggested no considerations that should prevent this Court from adhering to its usual practice of declining to review nonfinal orders of courts of appeals. See *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville R.R.*, 148 U.S. 372, 384 (1893).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01